COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

GLOBAL NAPS, INC.,

Plaintiff,

v.

VERIZON NEW ENGLAND, INC.;

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY;

and

PAUL B. Vasington, JAMES CONNELLY, W. ROBERT KEATING, DEIRDRE K. MANNING, and EUGENE J. SULLIVAN,

In their capacity as Commissioners,

Defendants.

Appeal No. _____

PETITION OF GLOBAL NAPS, INC. FOR APPEAL PURSUANT TO G.L. C. 25, SECTION 5

For its Complaint against Defendants Verizon New England, Inc. ("Verizon"), the Massachusetts Department of Telecommunications and Energy ("DTE"), and Messrs. Vasington, Connelly, Keating, Manning, and Sullivan (the "Commissioners"), Plaintiff Global NAPs, Inc. ("Global NAPs") alleges as follows:

NATURE OF THE ACTION

1. This complaint seeks review and reversal and associated equitable relief with respect to the DTE's decision, pursuant to 47 U.S.C. §§ 251-52, not to reconsider its interpretation of a provision of an interconnection agreement between the parties. Under the Communications Act, telephone companies such as Global NAPs and Verizon are supposed to

negotiate the terms on which they will interconnect their networks. 47 U.S.C. §§ 252(a), 251(c)(2). If negotiations fail, state regulators such as the DTE are to "arbitrate" the issues and establish the terms of the parties' agreement. 47 U.S.C. § 252(b). Whether an agreement is established by negotiation or arbitration, however, it must be submitted to the affected state regulators for approval. 47 U.S.C. §§ 252(e)(1), (2). Thereafter, the state regulator is responsible for enforcing and interpreting the agreements it has approved. State regulatory determinations about the establishment, enforcement, and interpretation of agreements are subject to review in federal district court. 47 U.S.C. § 252(e)(6).

2. In a prior decision, the DTE applied its own interpretation of a 1999 decision by the Federal Communications Commission ("FCC") that was later vacated and remanded by the United States Court of Appeals for the D.C. Circuit; the DTE's interpretation in turn recently was found by the United States District Court for the District of Massachusetts to violate Federal law. In relying on its prior decisions, the DTE declined to accord preclusive effect to the Rhode Island Public Utilities Commission's prior adjudication of this same provision. Immediately after the issuance of this federal district court decision declaring unlawful the DTE's prior decisions, Global NAPs sought reconsideration of the DTE's interpretation. The DTE declined to reconsider and reaffirmed its reliance on the vacated FCC decision and on its own policy preference in place of the plain language of the agreement.

3. Here, the relevant interconnection agreement was established by negotiation (albeit somewhat circuitously, as described below), and took effect in July 2000. The agreement included a specific provision, Section 5.7.2.3, requiring that, under certain circumstances, when one party's subscriber calls an Internet Service Provider ("ISP") served by the other party, the originating party is obliged to pay the other party at a rate set by the contract. The parties did not

agree on the proper interpretation of this provision, and the DTE considered their dispute in conjunction with its review and approval of the agreement itself. Verizon claimed that during the entire period from July 2000 onward, Section 5.7.2.3 did not apply; Global NAPs disagreed. On June 24, 2002, the DTE issued a determination that sided with Verizon. *Global NAPs, Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions*, Docket No. DTE 02-21 (rel. June 24, 2002) ("*DTE Initial Order*"). A true and accurate copy of this order is appended as Exhibit "A." Global NAPs appealed this order to the Supreme Judicial Court under G.L. c. 25 §5, and to the United States District Court for the District of Massachusetts. The appeals are pending.

4. The *DTE Initial Order* was based on the DTE's ruling in *Complaint of MCI WorldCom, Inc. against New England Tel. & Tel. Co. d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996*, Docket No. D.T.E. 97-116-C (rel. May 19, 1999) ("*1999 DTE Order*"), and subsequent orders in that same docket. On August 27, 2002, the United States District Court for the District of Massachusetts ruled that the 1999 DTE Order, and its progeny, violated federal law. *Global NAPs v. Verizon*, 226 F. Supp. 2d 279 (D.Mass. 2002) As the *DTE Initial Order* was intimately linked to and dependent on these overruled orders, it is also in violation of Federal law. Accordingly, on August 30, 2002, three days after *Global NAPs v. Verizon* was decided, Global NAPs sought a reconsideration of the *DTE Initial Order*. Global NAP's Petition for Reconsideration is appended hereto as Exhibit "B."

5. On February 12, 2003, the DTE denied reconsideration in *Global NAPs, Inc.'s Adoption of the Terms of the Interconnection Agreement Between Global NAPs, Inc. and Verizon*

Rhode Island Pursuant to the Bell Atlantic/GTE Merger Conditions, Docket No. D.T.E. 02-21-A (rel. Feb. 12, 2003) ("*Reconsideration Order*"). A true and accurate copy of said order is appended as Exhibit "C." The DTE denied reconsideration on two grounds: first, the motion was filed outside the 20 days allowed by DTE regulations for motions for reconsideration, and second, for substantive grounds based on a vacated FCC Order. The instant action is an appeal of the *Reconsideration Order*.

PARTIES

6. Global NAPs is a corporation formed in 1996 under the laws of the State of Delaware. Global NAPs' address is 10 Merrymount Road, Quincy, Massachusetts 02169. Global NAPs is a competitive local exchange carrier that currently provides telecommunications services in a number of states, including Rhode Island and Massachusetts.

7. Upon information and belief, Verizon New England, Inc. is a New York corporation with its principal place of business in Boston, Massachusetts. Verizon New England, Inc. is a local exchange carrier that provides telecommunications services in a number of states, including Rhode Island and Massachusetts. Upon information and belief, Verizon New England, Inc., uses different "d/b/a" names in Rhode Island and Massachusetts but is, in fact, a single legal entity operating in both of those states. Verizon New England was formerly named "New England Telephone and Telegraph Company" and did business as "NYNEX" and then as "Bell Atlantic." It is an "incumbent local exchange carrier" within the meaning of 47 U.S.C. § 251(c).

8. Defendant DTE is a regulatory agency created and existing under the laws of Massachusetts and headquartered in Boston, Massachusetts. It has jurisdiction over the intrastate activities of telecommunications companies operating in Massachusetts, as well as responsibility for arbitrating, approving, interpreting and enforcing interconnection agreements established

under Sections 251 and 252 of the Communications Act. It is a "State commission" within the meaning of 47 U.S.C. § 153(41).

9. Defendant Paul A. Vasington is Chairman of the DTE. Defendants James Connelly, W. Robert Keating, Deirdre K. Manning, and Eugene J. Sullivan are Commissioners of the DTE. These defendants are named in their official capacity for declaratory and injunctive relief only. Commissioner Sullivan dissented from the *DTE Initial Order* and did not sign the *Reconsideration Order*, and is named only for purposes of equitable relief as to all commissioners.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this matter, and venue is proper in this Court, pursuant to G.L. c. 25 § 5. Global NAPs is filing this appeal in this Court pursuant to G.L. c. 25 § 5 to preserve its rights in the event there is any question as to jurisdiction in federal court.

FACTUAL BACKGROUND

11. In April 1997, Global NAPs and Verizon entered into an interconnection agreement under Sections 251 and 252 of the Communications Act applicable to Massachusetts. (At that time, Verizon was known as "New England Telephone & Telegraph Company.") This agreement had a stated term of three years, *i.e.,* through April 2000.

12. In July 1998, Global NAPs and Verizon agreed to a Memorandum of Understanding setting out a set of terms that would apply to interconnection agreements governing the parties' operations in Maine, New Hampshire, Vermont, New York, and Rhode Island.

13. The understanding reached in July 1998 was embodied in interconnection agreements for Maine, New Hampshire, Vermont, New York, and Rhode Island over the

remainder of 1998. The interconnection agreement for Rhode Island took effect in October 1998, for a three-year term, running through October 2001. This entire agreement was negotiated between the parties, and none of its terms were imposed on either party by the Rhode Island Public Utilities Commission or by any other regulatory body as a result of arbitration under Section 252(b) of the Communications Act, or otherwise. A copy of this Agreement in relevant part is attached to the Complaint as Exhibit "D."

14. Section 5.7.2.3 of the Rhode Island Agreement contained the following provision (emphasis added):

> The Parties stipulate that they disagree as to whether traffic that originates on one Party's network and is transmitted to an Internet Service Provider ("ISP") connected to the other Party's network ("ISP Traffic") constitutes Local Traffic as defined herein, and the charges to be assessed in connection with such traffic. The issue of whether such traffic constitutes Local Traffic on which reciprocal compensation must be paid pursuant to the 1996 Act is presently before the FCC in CCB/CPD 97-30 and may be before a court of competent jurisdiction. The Parties agree that the decision of the FCC in that proceeding, or as such court, shall determine whether such traffic is Local Traffic (as defined herein) and the charges to be assessed in connection with ISP Traffic. ***If the FCC or such court determines that ISP Traffic is Local Traffic, as defined herein, or otherwise determines that ISP Traffic is subject to reciprocal compensation, it shall be compensated as Local Traffic under this Agreement unless another compensation scheme is required under such FCC or court determination. Until resolution of this issue, BA agrees to pay GNAPs Reciprocal Compensation for ISP Traffic*** (without conceding that ISP Traffic constitutes Local Traffic or precluding BA's ability to seek appropriate court review of this issue) pursuant to [a Rhode Island Public Utilities Commission's order requiring Verizon to pay reciprocal compensation on ISP Traffic until further order of the FCC] as such Order may be modified, changed or reversed.

15. Starting in March 1999, Verizon argued that an FCC Order, *In The Matter of implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket 96-98 (Feb. 26, 1999) *vacated sub nom. Bell Atlantic v. FCC*, 201 F.3d 1, 3 (D.C. Cir. 2000) (*"FCC Internet Traffic Order"),* "resolved" the issue against compensation within the meaning of Section

5.7.2.3, and stopped paying. Global NAPs brought a complaint against Verizon at the Rhode Island Public Utilities Commission. In November 1999, that state commission ruled that the FCC's February 1999 ruling had ***not*** "resolved" the issue within the meaning of the contract. Verizon did not seek review of this ruling; instead, it paid its back bills to Global NAPs and thereafter continued to pay under the Rhode Island Agreement.

16. Also in October 1998, Bell Atlantic Corporation – at that time the ultimate parent company of Verizon New England, Inc. (still known as New England Telephone and Telegraph Company) – sought approval from the FCC to merge with GTE Corporation and to form the entity now known as "Verizon Communications." Following the consummation of that merger in or about June 2000, the defendant changed its name to Verizon New England, Inc., and changed its d/b/a names to "Verizon Massachusetts" for Massachusetts and to "Verizon Rhode Island" for Rhode Island. On information and belief, however, the legal entity providing service in those two states remained unchanged.

17. The FCC's review of the proposed Bell Atlantic-GTE merger began in October 1998 and was not completed until June 2000. To obtain FCC approval of the merger, GTE Corporation and Bell Atlantic Corporation agreed to abide by certain conditions regarding their post-merger activities. These conditions are embodied in the FCC's order approving the merger. *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order,* 15 FCC Rcd 14032 (2000) (*"Merger Order"*).

18. Under the Communications Act, wherever an incumbent local exchange carrier (such as Verizon) had voluntarily negotiated an interconnection agreement with a competitive

local exchange carrier (such as Global NAPs) for a particular state, that same agreement would be available to any other competitive local exchange carrier for that state. The purpose of this was to spare competitive carriers the time, expense, and uncertainties of negotiating an agreement with the incumbent.

19. To ameliorate the anti-competitive effects of the merger, Verizon proposed, and the FCC required, a merger condition, known as "Paragraph 32," which generally requires wherever a telephone company (such as Verizon New England) owned by one of the merging parties had voluntarily negotiated an interconnection agreement in one state, that same agreement would now be available to potential interconnecting telephone companies in other states served by that same pre-merger telephone company or its pre-merger affiliate.

20. As described above, Global NAPs and Verizon had voluntarily negotiated an interconnection agreement applicable to Rhode Island. In July 2000, Global NAPs exercised its right under Paragraph 32 to adopt the negotiated Rhode Island Agreement to govern the parties' relationship in Massachusetts.

21. Initially, Verizon contested that the Rhode Island Agreement was subject to adoption in Massachusetts under Paragraph 32. In November 2000, however, the parties entered into a contract in which they agreed that, as of July 24, 2000, Global NAPs would be deemed to have adopted all portions of the Rhode Island Agreement that were adoptable in accordance with Paragraph 32.

22. The parties then disagreed about whether Section 5.7.2.3 of the agreement was adoptable in Massachusetts under Paragraph 32. When attempts to negotiate this issue failed, Global NAPs brought a complaint against Verizon at the FCC, seeking a ruling that Section 5.7.2.3 is indeed subject to adoption. The FCC ruled in Global NAPs' favor on this point in

February 2002. *Global NAPs, Inc. v. Verizon Communications*, Memorandum Opinion and Order, File No. EB-01-MD-010 (rel. Feb. 28, 2002).

23. The parties' contract from November 2000 required Verizon to submit the Rhode Island Agreement to the DTE for approval "promptly." In fact, Verizon did not do so until April 2002, following the FCC's decision in Global NAPs' favor on the adoptability of Section 5.7.2.3. It did so grudgingly, however, submitting the agreement but simultaneously urging the DTE to rule that Section 5.7.2.3 either was not adoptable in Massachusetts or that that provision did not require compensation for ISP-bound calls and, in the alternative, to reject the agreement.

24. The claim that Section 5.7.2.3 did not require compensation for ISP-bound calls was directly contrary both to the language of the contract and to the specific ruling on that point by the Rhode Island Public Utilities Commission. Section 5.7.2.3 recognizes that the issue of compensation for ISP-bound calls is disputed, in part because it was unclear whether ISP-bound calls may properly be viewed as "local" calls as ultimately determined by the FCC or a court of competent jurisdiction. Given this controversy, in Section 5.7.2.3 the parties reached a compromise that requires compensation for such calls as long as the issue is unresolved by the FCC and/or the courts.

25. The United States Court of Appeals for the D.C. Circuit vacated the 1999 *FCC Internet Traffic Order* in March 2000. *Bell Atlantic* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). Consequently, whatever the February 1999 FCC order might or might not have done up to that point, the issue of compensation for ISP-bound calls was unresolved from March 2000 at least until the FCC's next order on this topic in April 2001, *In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996: Intercarrier*

Compensation for ISP-Bound Traffic, Order on Remand Report and Order, CC Docket No. 96-98 (rel. April 27, 2001) ("*FCC ISP Remand Order*").

26. Global NAPs initially argued that the *FCC ISP Remand Order* did not resolve the issue within the meaning of Section 5.7.2.3. Following litigation on this point, the Rhode Island PUC ruled that the *FCC ISP Remand Order* did indeed resolve the issue. Global NAPs did not appeal that ruling. As a result, the FCC's new rules on compensation for ISP-bound calls have governed the parties' relationship in Rhode Island since they took effect in June 2001.

27. In sum, the issue of compensation for ISP-bound calls was unresolved as of July 2000, when Global NAPs adopted the Rhode Island Agreement for use in Massachusetts, in accordance with Paragraph 32 of the GTE-Bell Atlantic merger conditions. As of that date, the Rhode Island PUC had specifically ruled that the FCC's February 1999 order did not, in fact, "resolve" the issue within the meaning of Section 5.7.2.3 and in any case the D.C. Circuit had vacated that FCC order several months earlier, in March 2000.

28. The issue matters in practical terms because Verizon's customers during the relevant period made a substantial number of calls to ISPs served by Global. The total number of ISP-bound minutes of use sent from Verizon to Global NAPs in Massachusetts during the period from July 2000 to June 2001 is in excess of 3.75 billion as agreed by the parties; at the contract rate of $0.008 per minute, this translates to a liability for that period from Verizon to Global NAPs in excess of $30 million.

29. As noted above, Verizon submitted the Rhode Island Agreement for approval by the DTE in April 2002, but (a) actually requested the DTE to reject, rather than approve, the agreement; and (b) also requested the DTE to rule that Section 5.7.2.3 did not require compensation for ISP-bound calls during the period from July 2000 to June 2001.

30. The DTE issued the *DTE Initial Order* on June 24, 2002. The DTE acknowledged that Section 5.7.2.3 was, indeed, subject to adoption under Paragraph 32. Relying on the FCC's vacated *FCC Internet Traffic Order* and prior applications of that order in Massachusetts, the DTE ruled that during the relevant time period (the contract adoption date of July 2000, through the effective date of the FCC's new ruling, in June 2001), the issue of compensation for calls to ISPs supposedly was "resolved" for purposes of Rhode Island Agreement such that no such compensation was due. The order stated:

> Our precedent states that the issue of whether ISP-bound traffic is local traffic and, thus, subject to payment of reciprocal compensation, was resolved in Massachusetts with the issuance of the FCC's Internet Traffic Order in February 1999. As we stated in D.T.E. 97-116-C [the *1999 DTE Order*], the FCC's Internet Traffic Order held that ISP-bound traffic was not local traffic, but rather interstate traffic, and, thus, the FCC struck down the sole and express basis for the Department's earlier holding that interconnection agreements required reciprocal compensation for terminating ISP-bound traffic. See D.T.E. 97-116-C at 21-22. Accordingly, we concluded that without a current effective Department Order requiring Verizon to pay interconnecting carriers for termination of ISP-bound traffic, no compensation payments for this "non-local" traffic were required.

DTE Initial Order at 15.

31. Global NAPs appealed the *DTE Initial Order* both to this Court and to the United States District Court for the District of Massachusetts. These appeals are still pending.

32. On August 27, 2002, the United States District Court for the District of Massachusetts in *Global NAPs* v. *Verizon*, 226 F. Supp. 2d 279 (D.Mass. 2002), ruled that the very Department orders on which the Department relied for its finding that Global NAPs is not entitled to compensation for ISP-bound calls under the Rhode Island Agreement are contrary to Federal law.

33. Three days later, on August 30, 2002, Global NAPs filed a petition for reconsideration of the *DTE Initial Order*. Global NAPs claimed:

> It is clear that the standard for reconsideration is met in this case… it is clear beyond debate that the supposed validity of those orders [the *1999 DTE Order* and its progeny] was the only basis on which the Department relied in concluding that compensation for ISP-bound calls was ***not*** due to Global NAPs under the Rhode Island Agreement. *See* DTE 02-21 at 13-18. It is now clear that this crucial assumption was, in fact, false. The only logical result, therefore, is that the Department's decision in this matter should be reconsidered.

34. On February 12, 2003, the DTE issued the *Reconsideration Order* that is the subject of this appeal. The order denied reconsideration on two grounds. The first was "unexcused lateness." Specifically, the order stated: "[I]n its Petition for Reconsideration, Global NAPs failed to address good cause for its late-filing. Unexcused lateness is sufficient grounds to deny a reconsideration request, and, therefore, we deny Global NAPs' Petition for Reconsideration on that basis." *Reconsideration Order* at 6.

35. The second ground for denying reconsideration was that there was no "basis upon which to support its request for reconsideration" because beginning with the vacated *FCC Internet Traffic Order* the FCC has held that ISP-bound traffic is not subject to reciprocal compensation. As the DTE explained it:

> Beginning with the Internet Traffic Order, the FCC has consistently and explicitly determined that ISP-bound traffic falls outside of section 251(b)(5)'s reciprocal compensation obligations, and, in incorporating by reference the FCC's "resolution of the issue" into Section 5.7.2.3 of their interconnection agreement, the parties likewise excluded the payment of reciprocal compensation for ISP-bound traffic from their obligations under the Rhode Island Agreement. The District Court's ruling in Global NAPs v. Verizon does not change this contract analysis. Therefore, we conclude that Global NAPs has provided no basis upon which to support its request for reconsideration, and has failed to show good cause for its filing well outside the 20-day period provided by 220 C.M.R. § 1.11(10), and we thereby deny the request.

Reconsideration Order at 11 (footnote omitted).

36. The *Reconsideration Order* embodies a number of plainly reversible errors of law, is arbitrary and capricious, and is not supported by substantial evidence as described below.

COUNT I: Error Regarding Procedural Grounds Denial of Petition

37. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

38. Although pursuant to 220 C.M.R. § 1.11(10) a party has 20 days to move for reconsideration on a DTE order, the DTE has regularly entertained motions in the nature of reconsideration more than 20 days after the issuance of a decision where such motions have been based on subsequent changes by the FCC or federal courts to the grounds for the decision at issue. The DTE did so in 1999 when it vacated its earlier ruling holding that reciprocal compensation was payable for ISP-bound traffic under Massachusetts interconnection agreements, and it did so several times in the ensuing docket.

39. The court in *Global NAPs* v. *Verizon*, 226 F.Supp. 2d 279 (D.Mass 2002), ruled that the orders on which the DTE based its *DTE Initial Order* violated federal law, and issued this ruling well after the 20-day window for filing motions for reconsideration: on August 27, 2002. Global NAPs filed its petition just three days after this federal court decision was issued. Since the basis for Global NAPs' motion for reconsideration was the decision in *Global NAPs v. Verizon*, the subsequent grounds for Global NAPs to file its motion did not exist before the latter case was decided.

40. The DTE's denial of Global NAPs' Petition for Reconsideration for "unexcused lateness" is arbitrary and capricious and lacking in reasoned consistency, in violation of established law, and not supported by substantial evidence.

COUNT II: Error of Law Regarding Denial of Petition Failure to Reconsider Based on Intervening Court Declaration

41. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

42. The express basis of the *DTE Initial Order* was that the DTE's "precedent states that the issue of whether ISP-bound traffic is local traffic and, thus, subject to payment of reciprocal compensation, was resolved in Massachusetts with the issuance of the FCC's Internet

Traffic Order in February 1999." *DTE Initial Order* at 15. The federal district court in *Global NAPs v. Verizon* ruled that this precedent violated Federal law.

43. Notwithstanding the federal district court's ruling that the DTE is required by federal law to interpret the parties' interconnection agreement according to contract principles, the DTE disregarded the plain language of the agreement and substituted its policy preference.

44. The DTE's denial of Global NAPs' Petition for Reconsideration for failure to show a "basis upon which to support its request for reconsideration" is arbitrary and capricious, in violation of established law, and not supported by substantial evidence.

COUNT III: Error Regarding Federal Law (Reliance on Vacated Decision)

45. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

46. In the *Reconsideration Order*, the DTE ruled that beginning with the *FCC Internet Traffic Order*, the FCC has consistently and explicitly determined that ISP-bound traffic falls outside of section 251(b)(5)'s reciprocal compensation obligations, and that by incorporating by reference the FCC's "resolution of the issue" into Section 5.7.2.3 of their interconnection agreement, the parties likewise excluded the payment of reciprocal compensation for ISP-bound traffic from their obligations under the Rhode Island Agreement in light of the *FCC Internet Traffic Order*.

47. This is clearly erroneous as a matter of law. Even if the *FCC Internet Traffic Order* could be read as resolving the question of the status of ISP-bound calls as "local" or "non-local," either in general or within the context of Section 5.7.2.3 of the interconnection agreement (as Global NAPs contends and the Rhode Island PUC found it cannot), the *FCC Internet Traffic Order* was vacated by the D.C. Circuit in March 2000. A vacated order is a legal nullity, of no force and effect. A vacatur wipes the slate clean, so to speak, so that the outcome of the dispute that had been resolved by the vacated order reverts to a state of uncertainty.

48. As a result, the DTE erred in concluding on the basis of this vacated order that the question of the status of ISP-bound calls as "local" or "non-local" was resolved as a matter of Federal law during the period relevant here, *i.e.*, from July 2000 through June 2001.

49. Consequently, the *Reconsideration Order* should be reversed and the DTE instructed to issue a ruling that holds that whether ISP-bound calls are "local" remained "unresolved" within the meaning of Section 5.7.2.3 of the interconnection agreement during the period from July 2000 through June 2001, and that compensation for such calls is due from Verizon to Global NAPs at the rate specified in the contract for such traffic during that period.

COUNT IV: Full Faith and Credit and Claim Preclusion

50. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

51. The Rhode Island PUC ruling that the *FCC Internet Traffic Order* did not resolve the issue of compensation for ISP-bound traffic within the meaning of Section 5.7.2.3, and that compensation for ISP-bound calls under Section 5.7.2.3 therefore was due notwithstanding the issuance of the *FCC Internet Traffic Order*, was a final and binding adjudication of that issue between Global NAPs and Verizon.

52. The Full Faith and Credit Clause of the United States Constitution requires that full faith and credit be given "to the public Acts, Records, and judicial proceedings of every other State." U.S. Const. Art. IV, § 1. *See* 28 U.S.C. § 1738 (authenticated acts, records, and judicial proceedings "shall have the same full faith and credit in every court within the United States … as they have in the courts of such State … from which they are taken"). Where, as here, an adjudicatory body with jurisdiction in one state (the Rhode Island PUC) resolves a particular issue between two parties (Global NAPs and Verizon), an adjudicatory body in another state (the Massachusetts DTE) is obliged to accept and enforce that determination from a sister state.

53. It violates the Constitution for the DTE to refuse to honor and impose on Verizon the same result with respect to the interpretation of the meaning of Section 5.7.2.3 of the parties' interconnection agreement that was reached by the Rhode Island PUC.

54. The DTE, in its role as adjudicator of interconnection disputes under Section 252 of the Communications Act, is obliged to apply accepted doctrines of issue preclusion to such adjudications. The DTE therefore erred in permitting Verizon to assert that the proper interpretation of Section 5.7.2.3 of the interconnection agreement was different from the interpretation that had been established by the Rhode Island PUC in litigation over this same issue between these same parties.

55. The *Reconsideration Order* should be reversed and the DTE instructed to issue a ruling that holds, as the Rhode Island PUC did, that the issue of compensation for ISP-bound calls remained "unresolved" within the meaning of Section 5.7.2.3 of the interconnection agreement during the period from July 2000 through June 2001, and that compensation for such calls is due from Verizon to Global NAPs at the rate specified in the contract for such traffic during that period.

COUNT V: Arbitrary and Irrational Action (Inconsistent Statements Regarding The Status of ISP-Bound Calls Under Federal Law)

56. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

57. The DTE is obliged to act in a manner that is not arbitrary or irrational or contrary to law.

58. With respect to the question of the status of ISP-bound calls as "local" or "non-local" under Federal law, the DTE had issued a ruling in or about July 2000, following the D.C. Circuit's vacatur of the FCC's February 1999 ruling, that had recognized that the question was, in fact, unresolved at that time as a result of the vacatur. In that same ruling, the DTE concluded

that it would not modify its treatment of the issue in the context of a dispute under other interconnection agreements, on the ground that the FCC was reconsidering the issue and that the DTE wanted to preserve the status quo in that other dispute until the FCC actually resolved the issue. A true and accurate copy of said Order is appended as Exhibit "E."

59. Having concluded at that time that the effect of the D.C. Circuit's vacatur was to cause the issue to be, again, unresolved, it was arbitrary and irrational for the DTE in its *Reconsideration Order* to conclude that, to the contrary, that question had been resolved for purposes of Section 5.7.2.3.

60. Consequently, the *Reconsideration Order* should be reversed and the DTE ordered to issue a ruling that holds that the issue of compensation for ISP-bound calls remained "unresolved" within the meaning of Section 5.7.2.3 of the interconnection agreement during the period from July 2000 through June 2001, and that compensation for such calls is due from Verizon to Global NAPs at the rate specified in the contract for such traffic during that period.

COUNT VI: Misapplication of Federal Law

61. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

62. The issue of whether ISP-bound traffic constitutes "local traffic" remains unresolved by the FCC to this day. The vacated *FCC Internet Traffic Order* expressly left the issue whether ISP-bound traffic is "local" traffic to contract interpretation. The *FCC ISP Remand Order* expressly did not purport either to resolve the issue whether ISP-bound traffic is local or to address interconnection agreements already in force and, to the extent that order did resolve the issue, that resolution has been reversed and remanded by the United States Court of Appeals for the District of Columbia Circuit.

63. The DTE's determination that the issue of whether ISP-bound traffic constitutes "local traffic" has been resolved by the FCC or a court of competent jurisdiction therefore is arbitrary and capricious, and is erroneous as a matter of law.

COUNT VII: Arbitrary and Capricious Actions

64. Global NAPs repeats and realleges the foregoing as though fully set forth herein.

65. For all of the reasons set forth above, the DTE's February 12, 2003 ruling is arbitrary and capricious.

REQUEST FOR RELIEF

WHEREFORE, plaintiff Global NAPs, Inc. respectfully requests that this Court:

1. Reverse the Rhode Island Agreement Reconsideration Order;

2. Declare that the DTE erred in refusing to require Verizon to abide by the Rhode Island PUC's interpretation of Section 5.7.2.3 of the parties' interconnection agreement;

3. Declare that the DTE erred in permitting Verizon to assert that Section 5.7.2.3 has a meaning that differs from that established by the Rhode Island PUC;

4. Declare that the DTE erred to the extent that it concluded that the status of ISP-bound calls as "local" or "non-local" was resolved as a matter of Federal law during the period from July 2000 through June 2001;

5. Declare that the DTE erred to the extent that it determined the parties' obligations under Section 5.7.2.3 of their interconnection agreement on the basis of the DTE's own policy views regarding compensation for ISP-bound calls, as opposed to on the basis of the actual language of Section 5.7.2.3 of the parties' agreement;

6. Declare that the DTE erred to the extent that it determined the parties' obligations under Section 5.7.2.3 of their interconnection agreement based on the DTE's interpretation of the obligations of parties under a different interconnection agreement with different language;

7. Declare that Section 5.7.2.3 of the parties' interconnection agreement was in full force and effect during the period from July 24, 2000 through and including June 14, 2001, and that whether ISP-bound calls are "local" remained "unresolved" within the meaning of Section 5.7.2.3 of the interconnection agreement during the period from July 2000 through June 2001, and that compensation for such calls is due from Verizon to Global NAPs at the rate specified in the contract for such traffic during that period;

8. Order the DTE to apply Section 5.7.2.3 consistent with the Court's declarations; and

9. Enter such further relief as may be just.

Respectfully submitted

Cameron F. Kerry BBO# 269660
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Christopher W. Savage
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel. (202) 659-9750
Fax. (202) 452-0067

Attorneys for Global NAPs, Inc.

LIT 1385780v1